STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 2, 2001
v	No. 224937 Allegan Circuit Court
JAMASA Z. DERRING, Defendant-Appellant.	LC No. 99-011228-FC

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree premeditated murder, MCL 750.316(1)(a), and three counts of possessing a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to three concurrent terms of life imprisonment without parole for the murder convictions, and a consecutive two-year term for the felony-firearm convictions. Defendant appeals as of right. We affirm.

I

This case involves the shooting deaths of three young victims, sixteen-year-old Dustin Sherrell, his seventeen-year-old sister Darla Sherrell, and Dustin's friend Jonathon Edwards, all of whom were found shot to death in the Sherrell family residence on the afternoon of April 1, 1999. Defendant was a close neighbor of the Sherrell family, a friend to Dustin, and briefly had dated Darla. Defendant was observed at the Sherrell residence in the company of the three victims during the evening of March 31, and during the morning of April 1 the four were seen together at various places.

On February 20, 1999, Antonio Flores was shot and killed less than one-half mile from the Sherrell residence. Evidence introduced at trial indicated that Dustin had revealed to several people his and defendant's participation in the murder of Flores, and that defendant likewise had stated that he shot Flores. The police also discovered physical evidence linking defendant to the three murders, specifically bullets taken from the three victims' bodies that were linked to two guns that defendant possessed.

II

Defendant first contends that the trial court violated his constitutional right to confront witnesses and deprived him of a fair trial by admitting several hearsay statements purportedly made by Dustin, one of the murder victims, regarding his and defendant's participation in the

Flores murder. We review for a clear abuse of discretion the trial court's decision whether to admit evidence. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

A

The trial court admitted Dustin's statements pursuant to MRE 804(b)(6), the catchall exception to the hearsay rule applicable when the declarant is unavailable. The prosecutor had requested that the court admit the hearsay statements as proof of defendant's motive in killing the three victims. The residual hearsay exception, MRE 804(b)(6), states in relevant part that "[t]he following are not excluded by the hearsay rule if the declarant is unavailable as a witness":

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

In interpreting an identical hearsay exception applicable irrespective of the declarant's availability, MRE 803(24), this Court explained that circumstantial guarantees of trustworthiness must exist to satisfy a defendant's constitutional right to confront the witnesses against him. *People v Lee*, 243 Mich App 163, 171-173; 622 NW2d 71 (2000). In determining whether a statement possesses adequate indicia of reliability, a court must consider the totality of the circumstances surrounding the making of the statement, including (1) the spontaneity of the statement, (2) the consistency of the statements, (3) the declarant's lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) the declarant's personal knowledge about the matter he discussed, (7) to whom the statements were made, e.g., a police officer who likely would investigate further, and (8) the time frame within which the statements were made. *Id*. at 178.

B

The trial court admitted the following four statements of Dustin pursuant to MRE 804(b)(6). Jessica Jones, who dated Dustin from January 1999 until two weeks before his death, testified that two days after the Flores murder she and Dustin were alone in his bedroom when she asked him if defendant was serious when he had stated on the night of Flores' murder that he was involved in a shooting, to which Dustin replied, yes.

Joseph Green, a cousin of Dustin and Darla who saw Dustin approximately three times each week, testified that about two days after the Flores shooting he spoke with Dustin in his bedroom while defendant and another of Green's friends also were present. Green stated that, in a conversation that "came out of nowhere," Dustin said that at a nearby intersection he had shot Flores from behind a tree, and that he and defendant then beat up a lady in the car with Flores "so she wasn't talking." Green recalled that defendant glared at Dustin after he made these statements. A couple days later in the presence of Green and defendant, Dustin advised Green that he had lied, and had not shot anyone.

Nicole Lawrence, a sixteen-year-old cousin of Dustin and Darla, testified that she and Dustin had a close relationship and spoke frequently. According to Lawrence, approximately two weeks before the triple murders she and Dustin discussed the Flores murder. While Lawrence and Dustin were alone at her house discussing the relationship between Darla and defendant, Dustin, who appeared serious, expressed his opinion that his sister and defendant should not be together because defendant was "a crazy type of person" who had "shot some [M]exican guy" when a robbery attempted by defendant did not happen "the way [defendant] wanted." Dustin did not tell Lawrence that he had participated in the shooting, or explain how he had obtained the information.

George Segelstrom, Jr., who had known the Sherrells for approximately six months at the time of the triple murders and often exchanged greetings with Darla and Dustin, testified that about one week before the murders he gave Dustin and Edwards a ride to a party. Segelstrom overheard Dustin saying to Edwards, "I can't believe he shot him," referring to Flores' murder. Segelstrom inquired who, to which Dustin replied defendant. Either Dustin or Edwards, who both appeared scared, further stated that the Flores shooting "was over some money or drugs or something," and Dustin expressed "that if they said anything to anybody . . . that he would shoot the family."

C

The hearsay declarations by Dustin, which reflect his involvement in Flores' murder, that he told several others about his and defendant's participation in Flores' murder, and that defendant had knowledge that Dustin revealed to others his and defendant's involvement in the murder, plainly tended to establish that defendant had a motive to kill the victims, thus satisfying subrule MRE 804(b)(6)(A). *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999) ("Proof of motive in a prosecution for murder, although not essential, is always relevant."). Furthermore, in light of the absence of other evidence showing that Dustin participated in Flores' murder and, to defendant's knowledge, told others about his and defendant's involvement with Flores' murder, we agree with the trial court's observation that Dustin's statements constituted "the prosecutor's only evidence of motive." MRE 804(b)(6)(B).

After reviewing the totality of the circumstances surrounding Dustin's statements to Jones, Green and Lawrence, we find that these statements possessed sufficient circumstantial guarantees of trustworthiness. The trial court found adequate indicia of reliability on the bases that Dustin's statements were spontaneous for the most part, consistent, made in emotional states, made privately to friends in whom Dustin likely would confide, were consistent with a young person dealing with the emotions of a traumatic event, and did not indicate a motive to fabricate or shift blame. We cannot conclude that the trial court clearly erred in finding these factors, which properly tend to establish the statements' trustworthiness. *Lee*, *supra* at 178.

Furthermore, our review of the record discloses additional particularized guarantees of trustworthiness not mentioned by the trial court. First, the circumstances, including that Dustin was with defendant at the time Flores was killed and his demeanor immediately afterward supports the conclusion he had witnessed a traumatic event, indicate that Dustin spoke from personal knowledge when he made statements about his and defendant's involvement in the Flores murder. Second, the reason Dustin could not testify, because he had been murdered, militates in favor of admissibility and also supports the trial court's conclusion that admission of Dustin's statements served the general purpose of the court rules and the interests of justice.

MRE 804(d)(6)(C); *Lee, supra*. Third, two of the statements occurred within a couple days of the Flores murder, a time frame supportive of the statements' admissibility, while another of the statements occurred within four weeks of the Flores murder, a time frame also supportive of admissibility to a lesser extent. Additionally, the statements either occurred in the safety of Dustin's own bedroom or in the safe haven of Lawrence's home. *Lee, supra*.

In light of these circumstantial guarantees of trustworthiness, we cannot conclude that the trial court abused its discretion in admitting Dustin's statements to Jones, Green and Lawrence under MRE 804(b)(6). *Lee, supra*; *Snider, supra*.

After reviewing the circumstances surrounding Dustin's statements to Segelstrom, however, we are not so comfortable that these statements were trustworthy. At the time of the statements, Segelstrom was more than twice Dustin's age, and had known the Sherrell family only for six months. Segelstrom admitted that he and Dustin never had a heart-to-heart talk. Rather than making the statements in the confidence engendering settings of his own bedroom or the home of a lifelong confidant, Dustin made them in the back of Segelstrom's automobile en route to a party. Moreover, the statements contained blame shifting toward defendant, and included new allegations of threats by defendant to shoot Dustin's family. Because under these circumstances we cannot find that Dustin's statements to Segelstrom are so trustworthy "that the test of cross-examination would be of marginal utility," we conclude that the trial court abused its discretion in admitting Dustin's statements to Segelstrom. *Idaho v Wright*, 497 US 805, 820; 110 S Ct 3139; 111 L Ed 2d 638 (1990).

Nonetheless, we find the erroneous admission of the statements to Segelstrom harmless in this case because it is "clear beyond a reasonable doubt that a rational jury would have found . . . defendant guilty absent the error." *People v Mass*, 464 Mich 615, 640, n 29; 628 NW2d 540 (2001). Evidence established that defendant admitted shooting Flores, and was in the area of Flores' shooting at the time of the murder. Defendant had a motive to kill the three victims in an attempt to cover up his involvement in Flores' murder. Defendant was the last person seen with the victims shortly before their deaths. Defendant frequently carried two small handguns, which one witness identified as .22 and .25 caliber handguns, and shot them at junk behind the trailer where he lived. Flores, Edwards and Darla Sherrell all were killed with a .22 caliber firearm, while Dustin was shot with a .25 caliber firearm. A state police firearms expert testified that (1) .22 caliber bullets from Flores' and Edwards' bodies had been fired from the same gun; (2) a .25 caliber bullet removed from Dustin's head, a .25 caliber bullet removed from the head of a deceased dog buried in the Sherrell backyard, which defendant in March 1999 had shot after the dog was struck by a vehicle, and a .25 caliber bullet found in a bullet-riddled air conditioner behind defendant's residence, all were fired from the same gun; (3) the many fired .22 caliber cartridge casings found at the murder scene and a .22 caliber shell casing found behind defendant's residence all were fired by the same gun; and (4) a .25 caliber shell casing found under Dustin's body was fired by the same gun that had fired three .25 caliber shell casings found at defendant's residence.

This abundant evidence of defendant's guilt convinces us beyond any reasonable doubt that the admission of Segelstrom's hearsay testimony regarding Dustin's statements constituted harmless error.

III

Defendant also argues that the trial court improperly admitted prior bad act evidence of his involvement in the Flores homicide. Because we do not detect that defendant specifically objected to the admission of evidence regarding the Flores murder on the basis that it constituted improper character evidence under MRE 404(b), defendant has failed to preserve this issue for our review. MRE 103(a)(1); *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). We nonetheless briefly consider the issue, reviewing the trial court's evidentiary decision for a clear abuse of discretion. *Snider*, *supra*.

In applying the four-part test for determining the admissibility of prior bad acts under MRE 404(b), *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994), we note that defendant does not contest that the prosecutor introduced evidence of defendant's involvement in Flores' murder for a proper purpose, specifically to show defendant's motive in murdering his friends, not to prove defendant's generally bad character. MRE 404(b)(1). Furthermore, this evidence plainly had probative value tending to establish defendant's motive, a fact of consequence in this case. *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998); *Rice*, *supra*. Given the very high probative value of the evidence concerning Flores' murder and the nature of the instant case, we cannot find that the probative value of the evidence was substantially outweighed by any risk of unfair prejudice to defendant. MRE 403; *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (explaining that unfair prejudice does not mean "damaging," but encompasses a situation in which a danger exists that the jury will give marginally probative evidence undue or preemptive weight), modified on other grounds 450 Mich 1212 (1995). We lastly note that the trial court properly instructed the jury how to consider this evidence. *VanderVliet*, *supra* at 75. We conclude that the trial court did not abuse its discretion in admitting evidence of defendant's involvement in Flores' murder.[1]

IV

Defendant next asserts his trial counsel provided ineffective assistance when he elicited witness testimony damaging to defendant. Because defendant failed to raise this issue in a motion for a new trial or an evidentiary hearing, we may review defendant's argument only to the extent that the existing record contains sufficient detail to support his claims. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659-659; 620 NW2d 19 (2000). After reviewing defendant's allegations, we find nothing in the record to overcome the strong presumption that defense counsel's questioning of the witnesses constituted sound trial strategy, which we will not second guess on appeal. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

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[1] Furthermore, the firearm-related evidence of defendant's involvement in Flores' murder directly related to the identification of defendant as the killer in the instant case. *People v Hall*, 433 Mich 573; 447 NW2d 580 (1989). In *Hall*, the Supreme Court found that the defendant's possession of a sawed off shotgun during an unrelated offense was relevant and admissible to show that the defendant committed the charged armed robbery using a similar weapon. *Id*. at 580-583. The Court explained that the evidence was admissible under MRE 401 "quite apart from also being evidence of other crimes, wrongs, or acts under MRE 404(b)" because "the shotgun itself was equally as direct an item of evidence of defendant's commission of the charged robbery in this case as marked bills or identifiable jewelry would be in another." *Id.* at 583-584. In this case, the linkage of (a) firearms-related evidence connecting defendant to Flores' murder together with (b) the firearms-related evidence of the instant killings directly tended to prove defendant's identity as the triple murderer.

V

Defendant further claims that the prosecutor engaged in misconduct when she argued that the jury should believe the testimony of a jail inmate, who initially stated that defendant had confessed to the murders and then on cross examination averred that he had lied, and improperly used the jail inmate's testimony to emphasize that defendant likewise was lodged in jail under maximum security. Because defendant failed to object at trial to the prosecutor's alleged misconduct, our review of this claim is limited to our determination whether plain error occurred. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). We find no misconduct, and thus no plain error. The record reflects that the prosecutor in good faith sought to admit the jail inmate's testimony, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), and that during closing argument the prosecutor properly argued the evidence admitted at trial and reasonable inferences arising therefrom as they related to the prosecution's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

VI

Defendant lastly contends that the prosecutor committed misconduct by attempting to shift the burden of proof to defendant to explain his whereabouts at the time of the murders. We find that the prosecutor properly questioned a police investigator regarding defendant's failure to provide the police solid details of his whereabouts after the triple murders, because once a defendant waives his constitutional rights and volunteers to speak with the police evidence of the defendant's demeanor and failure to answer particular questions may be admitted. *People v McReavy*, 436 Mich 197, 217-220; 462 NW2d 1 (1990); *Rice*, *supra* at 435-437. The prosecutor's questions did not shift to defendant the burden of proving his innocence, but properly attacked the credibility of defendant's theory that he was somewhere else when the triple murders occurred. *People v Fields*, 450 Mich 94, 106-107; 538 NW2d 356 (1995). We thus find no plain error arising from defendant's unpreserved allegations. *Schutte*, *supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter